IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

JIM HOOD, ATTORNEY GENERAL FOR
THE STATE OF MISSISSIPPI, EX REL.
THE STATE OF MISSISSIPPI — PLAINTIFF

v. — CAUSE NO. 251-12-33 CIV

CHRISTOPHER EPPS, IN HIS
OFFICIAL CAPACITY AS COMMISSIONER
OF THE MISSISSIPPI DEPARTMENT OF
CORRECTIONS; NATHAN KERN, DAVID GATLIN,
CHARLES HOOKER, ANTHONY McCRAY, AND
JOSEPH OZMET; KATHERINE ROBERTSON;
KIRBY GLENN TATE; AARON BROWN;
JOSHUA L. HOWARD; AZIKIWE KAMBULE;
AND JOHN OR JANE DOES 1-200 — DEFENDANTS

MOTION FOR LEAVE TO SUBMIT *AMICUS CURIAE* BRIEF IN SUPPORT OF ALL NATURAL PERSON DEFENDANTS, IN SUPPORT OF THE VALIDITY OF HIS CLEMENCY ORDERS AND FOR COUNSEL TO APPEAR AND ORALLY ARGUE BY

HALEY BARBOUR, IN HIS CAPACITY AS THE GOVERNOR OF MISSISSIPPI AT THE TIME OF THE EVENTS ALLEGED IN THE FIRST AMENDED VERIFIED COMPLAINT DATED JANUARY 18, 2012

(Oral Argument Requested)

(Miss. R. Civ. P. 6(d) Relief Requested)

Former Governor Haley Barbour, in his capacity as the Governor of Mississippi at the time of the events alleged in the First Amended Verified Complaint ("Governor Barbour"), respectfully moves this Court for leave to submit an *amicus curiae* brief in support of all natural person Defendants with respect to the validity of his clemency actions at issue herein, as well as for his counsel to appear at an appropriate time to orally argue his position. Governor Barbour would show: [1]

[1] Due to the urgent and necessitous nature of this proceeding, as well as the undersigned's recent retention as counsel for Governor Barbour, pursuant to Miss. R. Civ. P. 6(d), Governor Barbour also

1. The Mississippi Supreme Court and various Mississippi trial courts have permitted the submission of *amicus curiae* briefs at the trial court level. *E.g.*, *Sealy v. Goddard*, 910 So.2d 502, 504 (Miss. 2005); *City of Durant v. Laws Const. Co., Inc.*, 721 So.2d 598, 601 (Miss. 1998); *Ryals v. Pigott*, 580 So.2d 1140, 1175 (Miss. 1990); *McKee v. Hogan*, 145 Miss. 747, 110 So. 775, 780 (Miss. 1926); *Haas Trucking, Inc. v. Hancock County Solid Waste Authority*, 29 So.3d 853, 856 (Miss. App. 2010). Accordingly, this Court has the discretion to grant such leave as Governor Barbour seeks herein.

2. It has long been the standard under Mississippi law that:

> A motion for leave to file an amicus brief should demonstrate that (1) the amicus has an interest in some other case involving a similar question; or (2) counsel for a party is inadequate or the brief insufficient; or (3) there are matters of fact or law which may otherwise escape the court's attention; or (4) the amicus has substantial legitimate interests that will likely be affected by the outcome of the case and which interests will not be adequately protected by those already parties to the case. The court may in its discretion allow an amicus to participate in oral argument.

Cooper v. City of Picayune, 511 So.2d 922, 924 (Miss. 1987); *accord* Miss. R. Civ. P. 29(a).

3. Governor Barbour meets that standard for at least the following reasons.

4. **<u>Governor Barbour Has a Legitimate and Compelling Interest in this Case</u>**. This Court may take judicial notice that Governor Barbour has a legitimate and compelling interest in the outcome of this case. This case represents a direct challenge to the validity of numerous clemency actions taken by Governor Barbour through Executive Orders issued pursuant to his constitutional powers of clemency. *See* Miss. Const. Art. V, § 124 ("In all criminal and penal cases, excepting those of treason and impeachment, the governor shall have power to grant reprieves and pardons, to remit fines...").

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moves for leave to have this motion and any argument on his proposed *amicus curiae* brief, heard at the next upcoming hearing, currently scheduled for Monday, January 23, 2012.

5. **<u>The Other Parties May Not Adequately Present Certain Issues and Therefore there are Matters of Law Which May Otherwise Escape the Court's Attention</u>.** Here, neither the Office of the Governor of Mississippi, nor Governor Barbour have been made parties defendant – and for good reasons. First, it is well-established that the courts may not grant compulsory relief against the Governor:

> This Court repeatedly has prohibited issuance of a writ of mandamus against the Governor. *See Thomas*, 649 So.2d at 840; *McPhail*, 180 So. at 392 ("[w]ithin the limits of the power conferred upon him by the Constitution and the laws, the Governor is not subject to control by the courts *nor, as already mentioned, can any mandamus, prohibition, or injunction direct or restrain him in the exercise of his power.*") (emphasis added); *Broom v. Henry*, 136 Miss. 132, 148, 100 So. 602, 603 (1924); *Vicksburg and Meridian R.R. Co. v. Lowry*, 61 Miss. 102, 105, 1883 WL 3961 (1883). The reasoning is simple in that "[i]f the governor could not be removed from the performance of the functions of his office by imprisonment to compel compliance with the writ of mandamus, the judgment would be mere advice, and courts do not advise." *Id.* at 104. The circuit court relied upon the above authorities in denying the Attorney General's motion for preliminary injunctive relief and granting the Governor's motion to dismiss, or for judgment on the pleadings, as to the "portions of the Attorney General's complaint which seeks a writ of mandamus, other remedial writs, or injunctive relief of any kind." Finding that the circuit court did not abuse its discretion in denying the subject relief requested, this Court finds the Attorney General's cross-appeal is without merit.

Barbour v. State ex rel. Hood, 974 So.2d 232, 238 (Miss. 2008).

6. Second, Governor Barbour no longer occupies the office of Chief Executive of this State and therefore would be an improper party defendant in any event.

7. Thus, as neither the Office of the Governor of Mississippi nor Governor Barbour are or should be made parties, absent the grant of *amicus curiae* status to Governor Barbour, this Court will be deprived of *any* input from the current or former Chief Executive on matters that not only impact the instant Parties, but may affect the Office of Governor's clemency powers for generations to come.

8. **There are Substantial Legitimate Interests that Will Likely be Affected by the Outcome of this Case and Which Will Not be Adequately Protected by Those Already Parties**. Counsel for Governor Barbour has reviewed the docket filings to date and there are issues of law directly relevant – indeed dispositive to this Action – that have not been formally raised with the Court. *See* (Proposed Amicus Curiae Brief, Ex. "A"). Governor Barbour seeks by *amicus curiae* status to cure that deficiency. Thus, Governor Barbour certainly "has substantial legitimate interests that will likely be affected by the outcome of the case and which interests will not be adequately protected by those already parties to the case." *Cooper*, 511 So.2d at 924.

9. Here, the Attorney General has sought to place at least two issues before this Court. First, the meaning, scope and authority of Miss. Const. Art. V, § 124, the source of gubernatorial clemency power in Mississippi. Second, whether or not Governor Barbour and/or certain clemency applicants properly complied with putative legal prerequisites for the grant of clemency.

10. The first issue – being one of constitutional interpretation -- is certain to have enormous and long-lasting effects on the power of the Office of Governor of Mississippi.

11. The second issue will affect not only the former, current and future holders of the Office of Governor, but also directly implicates the constitutional liberty interests of not only the named Defendants herein, but also those of any current or future recipients of gubernatorial clemency.[2]

[2] This case does not appear to involve any putative "right" to clemency – a matter committed in these instances to the unreviewable discretion of the Governor – but rather the continuing liberty interests of those already granted final and unconditional clemency, many of whom have long ago been released from custody and have lived as productive members of their communities for a substantial period of time.

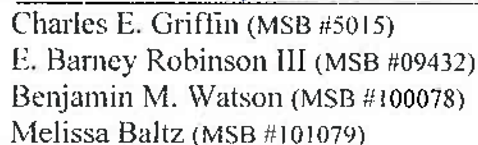
12. **Governor Barbour's Counsel Should be Permitted to Present Oral Argument**. The Mississippi Supreme Court has held that "the court may in its discretion allow an amicus to participate in oral argument." *Cooper v. City of Picayune*, 511 So.2d 922, 924 (Miss. 1987). It should go without saying that this is a case of statewide importance. For these reasons, the interests of the Office of the Governor of Mississippi, Governor Barbour himself and the citizens of this great State deserve to hear Governor Barbour's position on these matters, both by acceptance of the attached *amicus curiae* brief and though oral argument by Governor Barbour's counsel.

WHEREFORE, PREMISES CONSIDERED, Former Governor Haley Barbour, in his capacity as the Governor of Mississippi at the time of the events alleged in the First Amended Verified Complaint, respectfully moves this Court for leave to submit an *amicus curiae* brief in support of all natural person Defendants with respect to the validity of his clemency actions at issue herein, as well as for his counsel to appear at an appropriate time to orally argue his position.

A copy of Governor Barbour's proposed *amicus curiae* brief is attached hereto as Exhibit "A." Governor Barbour prays that should the Court grant this motion, it accept Exhibit "A" into the record as an *amicus curiae* brief without necessity of re-filing.

THIS the 23rd day of January, 2012.

FORMER GOVERNOR HALEY BARBOUR



By: ______________________________

Charles E. Griffin (MSB #5015)
E. Barney Robinson III (MSB #09432)
Benjamin M. Watson (MSB #100078)
Melissa Baltz (MSB #101079)

HIS ATTORNEYS

OF COUNSEL:

BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC
200 Renaissance at Colony Park, Suite 1400
1020 Highland Colony Parkway (39157)
Post Office Box 6010
Ridgeland, MS 39158-6010
(P) (601) 948-5711
(F) (601) 985-4500
(E) charles.griffin@butlersnow.com

ATTORNEYS FOR *AMICUS CURIAE*
FORMER GOVERNOR HALEY BARBOUR,
IN HIS CAPACITY AS THE GOVERNOR OF MISSISSIPPI AT THE TIME OF THE EVENTS ALLEGED IN THE FIRST AMENDED VERIFIED COMPLAINT

CERTIFICATE OF SERVICE

The undersigned, attorney for Former Governor Haley Barbour does hereby certify that he has delivered a copy of the foregoing instrument to the following, via First Class United States Mail, postage prepaid, e-mail and as otherwise reflected below:

The Honorable Jim Hood
Special Assistant Bridgette Wiggins
Attorney General for the State of Mississippi
P.O. Box 220
Jackson, Mississippi 39201
jhood@ago.state.ms.us
bwill@ago.state.ms.us

Alison Oliver Kelly
Alison Oliver Kelly, PLLC
Attorney at Law
P.O. Box 1644
Jackson, MS 39215
kellymd10@aol.com

U.S. Mail, E-mail and Hand Delivery
Honorable Tomie T. Green
Circuit Court Judge
First Judicial District of Hinds County, Mississippi
Hinds County Courthouse
407 East Pascagoula Street
Jackson, MS 39201
fashley@co.hinds.ms.us

David K. Scott
Mississippi Department of Corrections
723 North President Street
Jackson, MS 39201
dscott@mdoc.state.ms.us

Thomas M. Fortner
Richard A. Filce
ERIK M. LOWREY, P.A.
Attorneys at Law
525 Corinne Street
Hattiesburg, MS 39401
fortnertm@gmail.com
tom@eriklowreypa.com

This the 23rd day of January, 2012.

Charles E. Griffin (MSB #5015)

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**_AMICUS CURIAE_ BRIEF OF HALEY BARBOUR,
IN HIS CAPACITY AS THE GOVERNOR OF MISSISSIPPI
AT THE TIME OF THE EVENTS ALLEGED IN THE
FIRST AMENDED VERIFIED COMPLAINT DATED JANUARY 18, 2012**

(Miss. R. Civ. P. 6(d) Relief Requested)

Charles E. Griffin (MSB #5015)
E. Barney Robinson III (MSB #09432)
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Melissa Baltz (MSB #101079)

OF COUNSEL:

BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC
200 Renaissance at Colony Park, Suite 1400
1020 Highland Colony Parkway (39157)
Post Office Box 6010
Ridgeland, MS 39158-6010
(P) (601) 948-5711
(F) (601) 985-4500
(E) charles.griffin@butlersnow.com

ATTORNEYS FOR *AMICUS CURIAE*
FORMER GOVERNOR HALEY BARBOUR,
IN HIS CAPACITY AS THE GOVERNOR OF MISSISSIPPI AT THE TIME OF THE EVENTS ALLEGED IN THE FIRST AMENDED VERIFIED COMPLAINT

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Introduction and Summary

"[T] he legislative, executive, and judiciary departments ought to be separate and distinct. ...No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty. . . ." James Madison, *Federalist No. 47*

This suit represents an attack on the separation of powers ordained by the Mississippi Constitution. With exceptions not applicable here, the Constitution vests the power of pardon exclusively in the Governor. Neither the Legislature, through advice and consent, nor the Judiciary, through judicial review, is given any portion of that power. Indeed, the pardon power is an express constitutional check given by the people to the Governor on criminal and penal judgments of the State's appellate and trial courts.

What makes this suit especially troubling is that the Office of the State Attorney General gave legal advice and expressly agreed to undertake the publication of the 30-day notices that the Attorney General Jim Hood now seeks to have declared to be illegal based on a strained erroneous interpretation of Section 124 that has no support in the decisions of the Mississippi Supreme Court. There is no legal principle that permits General Hood to turn on his Special Assistants and bring suit based on the legal advice and the duties that those Special Assistants agreed to undertake on behalf of the Governor, the State Departments of the Executive Branch, and those whom those State Departments are charged by statute to manage, oversee, supervise, or hold in custody.

The State's trial and appellate courts do not have the constitutional authority to re-instate the sentences of the men and women whom the Governor has pardoned. Similarly, our State courts do not have the constitutional authority to order that a pardoned inmate be taken into custody and returned to jail or the authority to order that those five inmates holding pardons issued by the Governor remain illegally in the custody of MDOC.

The State Legislature has not enacted legislation creating any remedy with respect to a convicted felon's failure to publish his or her application for pardon for 30 days under Section 124. General Hood is without legal remedy to ask that the Court issue an arrest warrant or keep these pardoned inmates incarcerated. The Court's prior temporary restraining order should be dissolved, and the suit should be dismissed. To continue to grant the relief that the State Attorney General has obtained and to entertain this suit violates the executive power and the legislative power that the State Constitution expressly confers on the two co-ordinate, independent branches of State government.

STATEMENT OF THE CASE

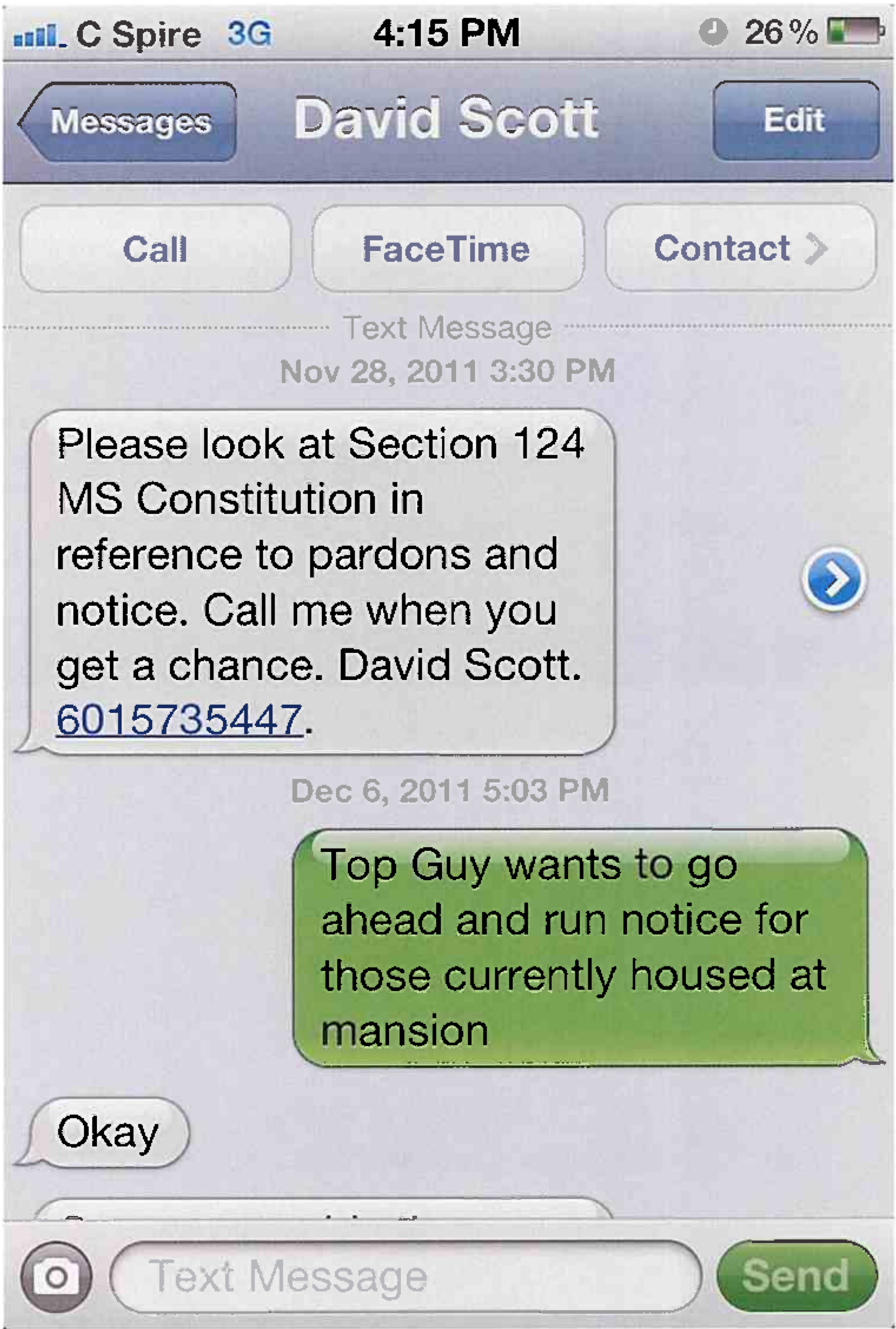
Consistent with Miss. Code § 47-7-5(3) (2011), the Parole Board has the exclusive responsibility for investigating clemency recommendations upon request of the Governor. Individuals seeking clemency apply to the Governor's Office or to the Parole Board. If the former, then the Governor's staff routinely sends the application or other request for clemency to the Parole Board for investigation.

The Parole Board investigates the application typically by having one of its investigators meet with the applicant, the prosecuting attorney, law enforcement, victims and/or supporters of the applicant. The investigator gives a report of the investigation to the Parole Board, and where possible and necessary, the Parole Board itself interviews the applicant.[1] The five-member Parole Board then votes on whether to recommend clemency to the Governor.

[1] Mansion trusties do not have pardon files at the Governor's office or at the Parole Board. They have in a sense "living files" because both the Governor and the First Lady, as well as the Highway Patrolmen assigned to the Governor's security, observe them every day and provide the information on which the Governor makes his decisions as to clemency. Some mansion trusties have been paroled by the Parole Board; some trusties have been pardoned by the Governor. Some inmates do not successfully complete their terms at the mansion because they failed to follow the rules. They are sent back to the custody of the MDOC to serve the rest of their term.

As was done with the previous pardons granted by the Governor at the end of his first term, Mississippi Department of Corrections ("MDOC") undertook the responsibility to arrange for the publication and payment of notices for the trusties who worked at the Governor's Mansion and were in the custody of MDOC under Section 124 of the Mississippi Constitution. Daryl Neely, the Governor's policy advisor for Corrections, had numerous conversations with MDOC about publication for the Mansion trusties and other inmates in the custody of the MDOC. Until November 28, 2011, his main contact at the MDOC was Commissioner Epps.

On November 23, 2011, the Governor met with his staff regarding pending pardon requests, discussing in particular the pardons of the mansion trusties. After that meeting, Neely talked to Commissioner Epps about publication of the notices on behalf of the trusties. Following up on that conversation, on November 28, 2011, David K. Scott, the Special Assistant Attorney General assigned to MDOC, texted Neely about Section 124 of the Mississippi Constitution. Their communications about publication for the inmates in the custody of the MDOC continued through December 7, 2011, when Scott stated that "MDOC will take care of those still in custody." The text messages between Scott and Neely appear below.


C Spire 3G
4:15 PM
26 %
Messages
David Scott
Edit
Call
FaceTime
Contact
Text Message
Nov 28, 2011 3:30 PM
Please look at Section 124 MS Constitution in reference to pardons and notice. Call me when you get a chance. David Scott. 6015735447.
Dec 6, 2011 5:03 PM
Top Guy wants to go ahead and run notice for those currently housed at mansion
Okay
Text Message
Send

C Spire 3G 4:17 PM 25 %

Messages **David Scott** Edit

Can you provide the names of the inmates that we need to run a notice for?

Yes....

Dec 6, 2011 5:16 PM

Some are current at mansion; some are out on parole - let me know if there is an issue with the ones out on parole - list coming next.....

Okay

....begin list - Avera, Jimmy R5943; Barnes,

Text Message Send

C Spire 3G 4:17 PM 25 %

Messages **David Scott** Edit

Jimmy R5943; Barnes, Booker 83338; Collins, Victor 62326; Gatlin, David 13343; Hooker, Charles 78485; Kern, Nathan 31029; McCray, Anthony K7876; Ozment, Joseph 83062; Sansing, Anthony 74634 - end of list....

Thanks

You are welcome. Thank you as well. Team effort.

Dec 7, 2011 10:58 AM

Atty Scott - incoming message to you....

Text Message

Send

C Spire 3G 4:17 PM 25 %

Messages **David Scott** Edit

Jimmy R5943; Barnes,
Booker 83338; Collins,
Victor 62326; Sansing,
Anthony 74634....all
worked at mansion but are
out and supervised by
Comm Corr....we need to
get word to them via their
field officers, etc that they
need to run (and pay) for
their public notice for
pardon
consideration....end
message....

Okay, we will do that.

Mdoc will take care of
those still in custody.

Text Message

Send

C Spire 3G 4:17 PM 25 %

Messages **David Scott** Edit

pardon
consideration....end
message....

Okay, we will do that.

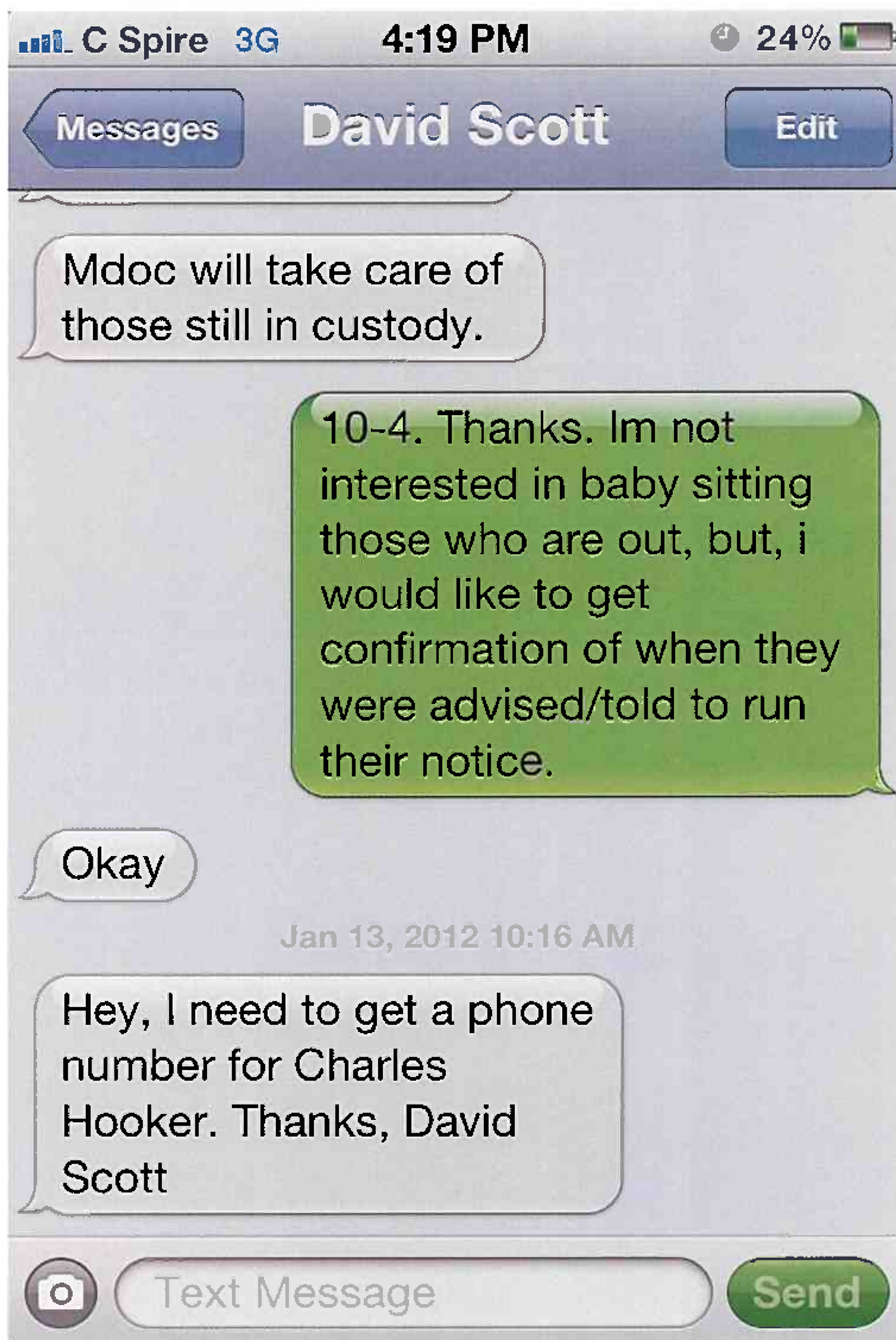
Mdoc will take care of
those still in custody.

10-4. Thanks. Im not
interested in baby sitting
those who are out, but, i
would like to get
confirmation of when they
were advised/told to run
their notice.

Okay

Jan 13, 2012 10:16 AM

Text Message Send



MDOC staff arranged on December 8, 2011 for the notices to be printed in the papers of the counties of conviction of the five mansion trusties for four weeks as follows:

- Legal ad for David Gatlin in the Rankin Record to run once a week for four weeks during the weeks of December 11th, 18th, 25th and January 1st.

- Legal ad for Charles Hooker in the Clarksdale Press Register to run twice weekly during the weeks of December 11th, 18th, 25th and January 1st,
- Legal ad for Nathan Kern in the Clarksdale Press Register to run twice weekly during the weeks of December 11th, 18th, 25th, and January 1st.
- Legal ad for Anthony McCray in the Enterprise-Journal to run the weeks of December 11th, 18th, 25th and January 1st and 8th.
- Legal ad for Joseph Ozment in the Desoto Times Tribune to run during the weeks of December 11th, 18th, 25th and January 1st.

Special Assistant Attorney General David K. Scott was copied on the MDOC memo outlining these dates.

A family member of Walter Johnson texted Neely on December 15, 2011, at 1:04 p.m., saying she saw Hooker's notice of his pardon request in the *Clarksdale Press Register*. The family of Tammy Ellis Gatlin met with a former staff member of Governor Barbour in 2010 to express their opposition to a pardon for David Gatlin because they assumed that as a mansion trusty he would be considered for a pardon.

On January 6, 2012, the Governor signed executive orders pardoning the trusties at the mansion. Neely spoke to Commissioner Epps about providing the notice to the sheriff of the county and the police chief of the city where the pardonees had been was convicted, pursuant to Miss. Code Ann. § 47-5-177 (1972). MDOC provided the notice of release of the mansion trusties on January 6, 2012.

Of the 215 petitions for clemency granted by the Governor, 189 were for convicted felons who were no longer in the custody of the MDOC. Many had been released from the custody of the MDOC years before and had been living productive lives.

Only 26 of the 215 were still in custody when the clemencies were granted. Sixteen of the 26 were given suspended sentences for medical or other reasons. By January 10, 2012, five people who had received a pardon remained in the custody of the MDOC.

ARGUMENT

I. WHETHER THE APPLICANT FOR A GUBERNATORIAL PARDON HAS PUBLISHED NOTICE OF THE APPLICATION 30 DAYS BEFORE THE GOVERNOR GRANTS A PARDON IS NOT REVIEWABLE ONCE THE GOVERNOR GRANTS A PARDON.

The "chief executive power of this State shall be vested in the Governor...." Miss. Const. § 116 (1890). The chief executive power includes the express constitutional authority to grant reprieves and pardons. Miss. Const. § 124 (1890), provides in its entirety:

> In all criminal and penal cases, excepting those of treason and impeachment, the Governor shall have power to grant reprieves and pardons, to remit fines, and in cases of forfeiture, to stay the collection until the end of the next session of the Legislature, and by and with the consent of the Senate to remit forfeitures. In cases of treason he shall have power to grant reprieves, and by and with the consent of the Senate, but may respite the sentence until the end of the next session of the Legislature; but no pardon shall be granted before conviction; and in cases of felony, after conviction no pardon shall be granted until the applicant therefor shall have published for thirty days, in some newspaper in the county where the crime was committed, and in case there be no newspaper published in said county, then in an adjoining county, his petition for pardon, setting forth therein the reasons why such pardon should be granted.

Id. As can be seen, there are certain substantive limitations on the constitutional pardon power granted to the Governor.

The Governor does not have the authority to grant a pardon in cases of treason or impeachment or in any criminal or penal case before there has been a conviction.

The Governor's authority to grant a reprieve or to remit a forfeiture is reviewable in the sense that another branch of state government may question the act of the Governor in two specific instances. First, the Governor has the power to grant reprieves in cases of treason subject to the consent of the Senate. Second, the Governor also has the power to remit forfeitures in criminal or penal cases - except for cases of treason or impeachment - subject to the consent of the Senate. Thus, it is only the Senate, a chamber of the Legislative Department, that has the authority to review the acts of the Governor, and the authority of the Senate is limited to certain special cases involving reprieves for treason and the remission of forfeitures in criminal

or penal cases. These are the only acts of the Governor authorized by Section 124 that are reviewable by another Department of State Government.

Section 124 therefore does not provide for the express review by another branch of state government of any other actions taken by the Governor related to the decisions to grant a reprieve, to remit a fine or forfeiture, or to pardon. If the framers of the Mississippi Constitution had wanted to provide for the review by another branch of state government of the Governor's exercise of the authority to pardon, they would have expressly placed this review power in Section 124. They did not.

This is wholly unremarkable because the gubernatorial pardon power – which does not extend to cases of treason, impeachment, or cases in which there is no conviction – is an express constitutional check and balance on the "judicial power" of the State's trial and appellate courts found in Section 144. It would defy common sense to permit this constitutional pardon power of the Chief Executive - once carried out - to be then reviewed by the state judiciary. By its express terms, the grant of a pardon by the Governor carried out as a part of his "chief executive power" under Section 116 is once made final and unreviewable.

For a court to entertain a lawsuit that seeks to nullify a pardon granted by the Governor in any case other than those already mentioned would violate the strict separation of powers principles of the State Constitution. *See Alexander v. State ex rel. Allain,* 441 So. 2d 1329 (Miss. 1983). This issue has been the subject of several Mississippi Supreme Court decisions, all of which have uniformly held that the power to pardon belongs solely to the Governor.

Thus, in *State v. Kirby*, 51 So. 811 (Miss. 1910), the court held that the Constitution grants the power to pardon solely to the Governor, and it cannot be delegated elsewhere by the

Legislature. *See State v. Jackson*, 109 So. 724 (Miss. 1926): *Ex Parte Chain*, 49 So. 2d 722 (Miss. 1951).

In affirming the Lieutenant Governor's power to pardon when the Governor is absent from the state, the court eloquently wrote about the breadth of the power to pardon:

> of course , he is the sole judge of the sufficiency of the facts and of the propriety of granting the pardon, *and no other department of the government has any control over his acts or discretion in such matters.* Nevertheless he acts for the public...He dispenses the public mercy and grace...no authority other than his judgment and conscience can determine whether it is proper to grant or refuse the pardon.

Montgomery v. Cleveland, 98 So. 111, 114 (Miss. 1923) (emphasis added).

As noted in *Whittington v. Stevens*, 73 So. 2d 137 (Miss. 1954), the general rule in most states is that where the constitution vests the power to pardon in the Governor, the exercise of his right to pardon, including commutation of sentences, once complete may not be restricted. This power is one "inherently vested in the people and they may vest it where they choose," and in Mississippi they chose to vest this power with the Governor. *Id.* at 109. The court in *Whittington* went on to explain:

> We hold that under the Constitution the governor is vested with the exclusive power to pardon with the sole exception that the legislature may provide for the commutation of the sentence of convicts for good behaviors; that the power to pardon includes the power to commute sentences in criminal cases.

Id. at 140; *see Randall v. Robinson,*736 So. 2d 1083 (Miss. Ct. App. 1999) (no state court may infringe on the Governor's power to pardon, citing *Whittington, supra*).

Judicial review is not only prohibited for gubernatorial pardons but for conditional pardons as well. In *Pope v. Wiggins*, 69 So. 2d 913 (Miss. 1954), the petitioner sought a writ of habeas corpus arguing that the Governor had improperly revoked the conditional pardon of a prior Governor. The habeas court denied the writ. On appeal, the State Supreme Court affirmed:

> Neither the judicial nor the legislative departments of the state are empowered to impose upon the chief executive the duty to perform judicial functions in the

> conduct of regular hearings in his office, even though in the exercise of his constitutional power of granting executive clemency there may be involved judgment and discretion in determining when he may be justified in revoking a suspended sentence 'for any reason deemed sufficient to the governor.' He is the judge of the sufficiency of the information, from whatever source, in determining whether he has a reason that he is entitled to deem sufficient for his action.

69 So. 2d at 916. The Court thus found that the Governor could impose whatever conditions he wished for the indefinite suspension of a sentence. It also held that the Governor could revoke such suspension if the conditions are not met without any kind of hearing.

Except for the three instances of cases of treason or impeachment or criminal and penal cases pending prior to conviction, a pardon whether conditional or unconditional becomes final and unreviewable by the state judiciary once granted. Thus, judicial review of whether the applicant for a pardon has complied with the 30-day legal notice provision of Section 124 is prohibited once a gubernatorial pardon has been issued. As Justice Ethridge has explained:

> The Governor has many questions to decide in the performance of his duties, and his decisions on these questions are final and conclusive on the other departments of the Government. For instance, he is limited in granting a pardon to such cases as where publications have been made for 30 days in a newspaper of the county, but his decision as to whether the publication was made is not open to judicial review.

State v. Metts, 88 So. 525, 530 (Miss. 1921) (Etheridge, J., dissenting).

The reasons why this is the case should be self-evident. The requirement of publication of notice of the application is wholly procedural in nature. It does not require that ***actual*** notice of a felon's application for pardon be given to anyone, even the victim of a crime, his or her family members, or their representatives. It is not limited to felons who are incarcerated. It applies to every convicted felon even one who has reentered the free world, is living with his or her family, and working as a productive member of society. Publication of the application is a form of constructive notice that may be satisfied by publishing the notice in "some" newspaper and in certain instances in a newspaper other than the county where the conviction occurred.

In those instances where the representatives of the victim believe that the convicted felon is incapable of rehabilitation and wholly incorrigible or the sensational nature of the crime created extensive media coverage, publication in a newspaper of the submission of the application is often superfluous because members of the local community will have told the Parole Board, the Governor, and the general public about their opposition to clemency through meetings or communications with this staff, press conferences, and organized letter writing campaigns undertaken by sympathetic organizations.

As already seen, the act of granting a gubernatorial pardon has been entrusted by the people under Section 124 to the Governor as the chief executive officer. Exercise of the act of pardon is not taken lightly, but only after extensive investigation, much soul searching, and the exercise of considered judgment. Once a pardon becomes final under Section 124, it is beyond the purview of the judiciary to review the Governor's exercise of judgment in deciding to grant the pardon.

The decisions of the Mississippi Supreme Court finding that the Governor's final act of granting a pardon is unreviewable are in accord with those states with similar constitutional provisions. Courts as early as 1883 held that the state judiciary is without authority to inquire into a pardon. In *Knapp v. Thomas* 39 Ohio St. 377, 391 (Ohio 1883), the appellate court wrote that it would be a "usurpation of authority" if the court tried to interfere with the governor's pardon power. The court explained that each branch of government can best safeguard its own powers and jurisdiction by refraining from interfering with those rights held by the other branches.

Over 100 years later, the Florida Supreme Court reaffirmed this principle:

> Whatever may have been the reasons for granting [or denying] the pardon, the courts cannot decline to give [the decision] effect…and no court has the power to

> review grounds or motives for the action of the executive in granting [or denying] a pardon, for that would be the exercise of the pardoning power in part, and any attempt of the courts to interfere with the governor in the exercise of the pardoning power would be the manifest usurpation of authority.

Wade v. Singletary, 696 So. 2d 754, 756 (Fla. 1997). As one noted legal encyclopedia explains:

> An executive may grant a pardon for good reason or bad, or for any reason at all, and the act is final and irrevocable. Even for the grossest abuse of this discretionary power the law affords no remedy; the courts have no concern with the reasons for the pardon. The constitution clothes the executive with the power to grant pardons, and this power is beyond the control, or even the legitimate criticism, of the judiciary.

59 Am Jur. 2d *Pardon and Parole § 44* (2002).

II. The Enactments of the Mississippi Legislature Show that the Power To Pardon Lies Solely with the Governor.

The Legislature has enacted numerous statutes that affect the rights and privileges of state prisoners. These statutes evidence a legislative intent that none shall be deemed to affect or constrict the Governor's constitutional power to pardon. Miss. Code § 47-7-5 (2011) sets forth the duties and powers of the State Parole Board. Section 47-7-5(3) provides that the Board "shall have exclusive responsibility for investigating clemency recommendations upon request of the Governor." The Board has no authority to infringe, modify, or overturn in any manner whatsoever any pardon decision by the Governor regarding pardons. While the Board can make recommendations in favor of or opposed to clemency, the ultimate decision lies solely in the sound discretion of the Governor.

Similarly, Miss. Code § 47-5-157 (2011) sets forth some of the procedures when an "offender" is entitled to discharge from the custody of the Mississippi Department of Corrections by "parole, pardon or otherwise." This includes that the Department give 48-hour notice before release of the offender as required by Miss. Code § 47-5-177 (2011). Section 47-5-177 requires that the Department send notice in cases of discharge, including pardon, to the sheriff of the county and to the chief of police of the municipality where the offender was convicted, or if the

offender is paroled to another county, to certain officials in that county. These statutes place no limits on the pardon authority of the Governor.

With respect to a conditional pardon, the Mississippi Legislature has expressly recognized that it is only the Governor, and not a court, who may set aside such a pardon. *See* Miss. Code § 99-19-29 (2011). When revoking a conditional pardon, the action of the Governor taken under Section 124 is unreviewable by the courts. *See Pope v. Wiggins*, 69 So 2d 913 (Miss. 1954).

Section 99-19-29 is also important because it demonstrates that even if an unconditional pardon were revocable, there must be statutory authority to return the recipient of the pardon to the custody of the state prison. With respect to a conditional pardon by the Governor or a suspended sentence that is granted by a court, if there is revocation of the pardon or of the suspended sentence,

> [t]he convicted offender shall thereafter be subject to arrest and court sentence service, as if no suspended sentence or conditional pardon had been granted, and shall be required to serve the full term of the original sentence that has not been served. The offender shall be subject, after such action by the court or the governor, to arrest and return to proper authorities as in the case with ordinary escaped prisoner.

Id.

In Section 99-19-29, the Legislature expressly provided a procedure for the imprisonment of an offender that violates the condition of a suspended sentence or a conditional pardon. Because there is no statute addressing an unconditional pardon, there is no mechanism for returning the recipient of such a pardon to prison. Had the Legislature sought to provide such a process, it could have passed a similar statute making it a crime to hold a defective pardon. Of course, the Legislature has passed no such statute because it would be an unconstitutional review

of the Governor's power to grant an unconditional pardon. In any event, in the absence of such a statute, there is no remedy against a pardonee who hold an unconditional pardon.

Moreover, even with habitual offenders the Legislature recognizes the exclusive pardon power of the Governor. Miss Code. §§ 99-19-81 to 99-19-87 (2011), the habitual offender statutes, identify those classes of convicted felons that the Legislature believes should serve mandatory sentence terms. Miss Code. § 99-19-85 (2011) provides: "Nothing in sections 99-19-81 to 99-19-87 shall be construed or considered as seeking or tending to impair the pardoning power or other powers reserved to the Governor under Section 124 of the Mississippi Constitution of 1890."

Finally, Miss. Code § 7-1-5 (2011) enumerates the duties and powers of the Governor. It specifically lists some of the constitutional duties of the Governor. For example, Section 7-1-5 (c) states that "he shall see that the laws are faithfully executed." Similarly, Section 123 of the Mississippi Constitution states that "the governor shall see that the laws are faithfully executed." However, nowhere in the long list of statutory duties and powers found in Section 7-1-5 does the Legislature purport to regulate the exercise of the pardon power vested in the Governor. The Mississippi Legislature has thus recognized there is no such authority except to the extent that it is expressly found in Section 124.

III. THE GOVERNOR ACTED IN GOOD FAITH.

The Governor acted in good faith in granting these pardons. As set forth in greater detail in The Statement of the Case, *supra*, he requested, consistent with Miss. Code § 47-7-5(3) (2011), that the Parole Board investigate the requests for clemency. The Parole Board made a thorough investigation and reported to the Governor its recommendations. The Governor made his final decisions after carefully considering the recommendations of the Parole Board and the views and feelings of the families of the victims, some of whom sought and obtained personal

meetings with the Office of the Governor even before the notice of the application of pardon was published. The Governor also had personal knowledge about the rehabilitation of the five pardoned trusties who worked at the Governor's Mansion as well as the views of the mansion security who also observed the trusties daily.

Additionally, the Governor through his staff relied in good faith on the assurances that David K. Scott, Special Assistant Attorney General to the Mississippi Department of Corrections, made to Daryl Neely, the Governor's policy advisor for corrections, that Scott would take care of the publication for the five pardoned Mansion trusties. The Governor's Office contacted Scott *before* November 24 about this subject. At no time did Scott advise the Governor's office that for a pardon of the Governor to be effective the applicant must publish his or her legal notice by a certain date or the subsequent pardon would be ineffective. As already seen, there is no decision of the Mississippi Supreme Court to that effect; in fact, the decisions of the Supreme Court say that once the pardon is granted, the Governor's act of pardon is unreviewable.

Special Assistant Attorney General Scott told Neely on December 6, which is 35 days before the Governor left office, that Scott would undertake to have the required notice published on behalf of each one of the five pardoned Mansion trusties. Neely believed Scott. Neely also believed in and relied upon Scott's assurances that he would also undertake to contact those former trusties, who had been released into the custody of the Parole Board or served a completed sentence and were no longer in its custody, and that Scott would tell them that they needed to publish and pay for publication themselves. Special Assistant Attorney General Scott also made these assurances to Neely 35 days before the Governor left office.

When the Governor signed the executive orders for each of the five pardoned mansion trusties and those former mansion trusties who had been released, the Governor did so in the good faith belief that Special Assistant Attorney General Scott had seen that their notices were published in the proper manner. Special Assistant Attorney General Scott never told Neely or any other member of the Governor's Office that the legal publications of the five pardoned Mansion trusties or the former mansion trusties were ineffective prior to the date the Governor signed their pardons.

IV. THE ATTORNEY GENERAL DOES NOT HAVE STANDING TO BRING THIS SUIT BECAUSE THE COMPLAINT FAILS TO STATE A CLAIM AND THERE IS NO AVAILABLE REMEDY.

Section 24 of the Mississippi Constitution states: "all courts shall be open: and every person for an *injury* done him in his lands, goods, person, or reputation, shall have remedy by due course of law and right and justice shall be advanced without sale, denial, or delay (emphasis added)." *See Reynolds v. State,* 521 So. 2d 914 (Miss. 1988) (plaintiff without standing since he could point to no legal right or privilege that had been denied to him for which he sought legal redress.); *Hancock County v. State Hwy. Comm'n*, 193 So. 808, 809 (Miss. 1940) ("one of the fundamental principles in invoking a court's jurisdiction is that the plaintiff ... must show a right in himself to invoke the jurisdiction of the court.")

Governor Barbour had the sole constitutional right to grant clemency during his term of office. No statute or constitutional provision creates a right to a pardon. Nor does any statute create a right *in any person* to object to a pardon once the pardon has been granted. Without a legally created right, there is no standing on anyone's part to bring suit to object to the granting of a pardon.

The constitutional provision on notice is not self-effectuating; there is no legislation stating how the notice must be done. The 30-day period merely affords notice by publication of

the felon's application for pardon in the community where the crime occurred. It does not create a legal right or duty to the public. It does not provide a basis for a claim or provide a legal remedy after the pardon has been granted.

Information from the Mississippi Department of Corrections indicates that in 92 of the cases the notice was published 30 days or longer before the date of the pardons. In the cases of the five pardoned trusties named in the complaint, the notice would undisputedly have been published 30 days before the pardon was granted except for the inaction of Special Assistant Attorney General Scott. Therefore, any problem with the initial date of publication for the five pardoned mansion trusties lies with the Office of the State Attorney General.

Indeed, assuming *arguendo*, that the notice had been published in all of these cases a full 30 days before the pardon, the public would have had a few more days to know about the pardons, *but they could not have stopped the pardons*. They had no right or privilege to do so since they had ceded that right to the Governor under the State Constitution. As discussed, only the Governor has the authority to grant a pardon, and he made this decision after careful consideration of the facts. There is no reason to believe that the opponents to these pardons had any additional information that would be provided during this additional time that would influence the decision. Because the First Amended Verified Complaint fails to allege that the Governor pardoned any persons convicted of treason or impeachment or any one prior to being convicted of a felon and because Section 124 fails to provide for any review of the Governor's act of pardon, it fails to state a claim upon which relief may be granted.

V. THIS ACTION IS IN REALITY AN ATTEMPT TO PERFORM A BACK DOOR WRIT OF PROHIBITION AGAINST THE THEN-GOVERNOR, WHICH THE LAW DOES NOT PERMIT.

Although Governor Barbour is not named as a defendant in this action, it is clear that the instant suit is an attempt to prohibit the Governor's exercise of the right vested by the Mississippi

Constitution to grant pardons. To this end, an action for mandamus does not lie against the Governor of Mississippi. *See Barbour v. State ex rel. Hood*, 974 So. 2d 232 (Miss. 2008). The Attorney General has sought an "end run" around his inability to sue the Governor by naming the recipients of the pardons and the Commissioner of the Mississippi Department of Corrections in an effort to nullify the pardons. As such, the action of the Attorney General has no proper legal foundation.

The authority of the State Attorney General to bring suit, whether based on the common law or statute, must be grounded in an express grant of authority and may not be implied. "[T]he general words of the Constitution … always and everywhere must be strictly construed against powers." *Henry v. State*, 39 So. 856, 862 (Miss. 1906); *accord Dunn Const. Co. v. Craig*, 2 So. 2d 166, 174-75 (Miss. 1941) (state tax collector does not have implied authority to file suit to collect gross income taxes under state statute granting such authority to state tax commission).

As the Mississippi Supreme Court has explained, the common law duties of the State Attorney General are determined by reviewing the authority granted to that office under the common law of England. For example, in *Capitol Stages v. State,* 128 So. 759, 763 (Miss. 1930), that Court wrote:

> At common law the duties of the attorney general, as chief law officer of the realm, were very numerous and varied. He was the chief legal adviser of the crown, and was entrusted with the management of all legal affairs, and the prosecution of all suits, civil and criminal, in which the crown was interested." He had authority to institute proceedings to abate public nuisances affecting and endangering public safety and convenience; he had the power to control and manage all litigation on behalf of the state; he could intervene in all actions which were of concern to the general public, including the right to institute, conduct, and maintain all suits necessary for the enforcement of the laws of the state, the preservation of order, and protection of the public rights.

Capitol Stages, 128 So. At 763.

The Attorney General of England did not have the ability to sue the chief executive because the attorney general and the chief executive occupied a principal/agent type relationship. *See* 6 William Haldsworth, A History of English Law 467-68 (2d ed. 1937, reprinted 1966) ("The [attorney general] did not represent the king in his courts, for the king was always theoretically present, but he followed the case on his behalf. He must see that the rights of his theoretically present but actually absent principal did not suffer . . ."). Because of this special representative relationship between the attorney general and the executive authority, the State Attorney General has no authority derived from common law to bring a direct suit against the Governor for actions he took while still in office. By statute, Mississippi has vested in the Office of the State Attorney General those powers that existed at common law.[2] The ability or right to bring a direct action against the chief executive officer of the State is not among them, and, as already shown, the authority to bring such an action may not be implied.

The power given to the State Attorney General to protect the rights of the public is not a separate, independent grant of substantive legal authority; it is simply among those purposes of the authority expressly granted to the Office of the State Attorney General at common law or by state law. In light of the fact that the authority of the Attorney General to sue the Chief Executive did not exist at common law, it is the responsibility of the State Legislature to enact legislation that expressly gives any such authority to our State Attorney General. For now, the express authority for Attorney General Hood to sue the Governor for actions taken while he was in office is not found at common law or in our state statutes, or our Court's precedents.

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[2] *See* Miss. Code § 7-5-1 (1972).

VI. There Is No Express or Implied Remedy for an Alleged Violation of the 30 Day Notice Provision, and Only the Legislature Has the Authority to Grant Such a Remedy.

The Legislature has not made it a crime for an applicant for a pardon to fail to comply with the 30-day notice period found in Section 124. Any such applicant is entitled to know as a matter of due process what legal effect arises from his failure to comply with the 30-day requirement, including what penalties or forfeitures to which he or she will be subjected. Miss. Const. 14 (1890); U.S. Const. Fourteenth Amend.

The Court cannot nullify a gubernatorial pardon issued under Section 124 except for three limited circumstances, none of which apply here. Thus, the Court cannot put someone who has been pardoned and released as a result of the pardon in jail; refuse to release a person who is incarcerated and has been pardoned; or nullify a pardon granted to someone who has been in the free world because he has allegedly violated the 30-day publication provision of Section 124. Section 33 of the Mississippi Constitution vests the "legislative power" in the State Legislature, Miss. Const. § 33 (1890), and only the State Legislature has the authority to make it a criminal offense or create a penalty for the failure of an applicant to comply with the 30-day publication provision.

To order that the pardonees must return to the custody of the Mississippi Department of Corrections or be arrested; that those pardonees who are incarcerated must remain in the custody of the Mississippi Department of Corrections; or that any pardonees who failed to publish for 30 days have thereby suffered any penalty, including forfeiture of their pardons, is wholly beyond the judicial power conferred by the Mississippi Constitution upon the state trial and appellate courts. Any such order would violate the separation of powers provisions of Miss. Const. §§ 1-2 (1890), which gives legislative power solely to the Legislature. *See Tuck v. Blackmon,* 798 So. 2d 402 (Miss. 2001).

VII. Even if this Case Were Justiciable – Which it is Not – the Attorney General's Interpretation of the 30-days Provision is Demonstrably Incorrect.

General Hood erroneously contends that the requirement in Section 124 of the Mississippi Constitution requires publication for 5 consecutive weeks if a weekly newspaper or, if in a daily, 30 consecutive days. He is wrong for at least three reasons. First, had the framers of the 1890 Constitution desired such a requirement, they could have written the provision to state that notice shall be "for 30 consecutive days." They did not. Instead, a plain reading of the text requires only that the notice have been "published for 30 days." In other words, that the notice was published at least 30 days before the date of the pardon. General Hood cannot insert words into the Constitution that the framers chose not to include.

Second, in interpreting a similar notice requirement, the Mississippi Supreme Court ruled long ago that consecutive publication for 30 days is not required. In *Henritzy v. Harrison County*, 178 So. 322 (Miss. 1938), the statute at issue required Harrison County to publish notice in the newspaper of its intent to condemn private property for use in the construction of a seawall. The statute provided that "publication may be made to the owners of lands sought to be condemned for such right of way as is here involved for thirty days in a newspaper." The affected landowners argued that because the notice was not published for 30 consecutive days, the taking was barred.

The Court disagreed and held that "[t]he requirement of a given number of day's publication of a notice has been quite uniformly held not to contemplate a daily printing of the notice." *Id.* at 327. Thus, General Hood's interpretation of the similar language in Section 124 is foreclosed by the holding in *Henritzy*.

Third, General Hood's attempted insertion into the Constitution of a "30 consecutive days" requirement ignores the reality that many of the county newspapers published in this state

are weekly, not daily, papers. Accordingly, for many of the newspapers in which the notices are to be published, it is impossible to publish a notice for 30 consecutive days. Instead, what is customarily done is to publish the notice once a week for four consecutive weeks. In *Henritzy*, the Court expressly approved of this practice. *Id.* at 326 (holding that where a notice "was published in a newspaper weekly for four consecutive weeks," the 30-day publication provision was satisfied.) To the extent that General Hood (in his own interpretation of the Governor's powers granted by the Constitution) would require publication for 5 weeks, or 35 days, such a requirement would add to the time period contained in Section 124 and is, itself, unconstitutional.

VIII. EVEN IF THIS CASE WERE JUSTICIABLE – WHICH IT IS NOT – FAILURE TO COMPLY WITH THE THIRTY DAY PUBLICATION REQUIREMENT CONSTITUTES HARMLESS CONSTITUTIONAL ERROR.

In *Chapman v. California*, 386 U.S. 18, 22 (1967), the United States Supreme Court defined harmless errors as "constitutional errors which in the setting of a particular case are so unimportant and insignificant" that they do not mandate automatic reversal of conviction. The Mississippi Supreme Court applies the *Chapman* analysis when reviewing constitutional errors. According to the Court in *Richardson v. State*, 74 So. 3d 317 (Miss. 2011):

> Harmless-errors are those which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction. *Williams v. State*, 991 So.2d 593, 599 (Miss. 2008) (quoting *Tran v. State*, 962 So.2d 1237, 1247 (Miss. 2007)). We "have the duty to be fair, not only to the defendant, but to the State as well." *Tran*, 962 So.2d at 1246. "Harmless-error analysis is often necessary to prevent unfair prejudice to the State, and the State is certainly prejudiced where convictions are reversed based on errors which do not affect the substantial rights of the parties." *Id.* (citations omitted).

Richardson at 327-328.

The harmless error analysis also applies in civil cases. For purposes of harmless-error analysis, courts distinguish "structural error" from "harmless error." The distinction between

"structural error" and "harmless error" was discussed by the Court in a civil case styled *Kindhearts for Charitable Humanitarian Development v. Geithner*, 710 F. Supp. 2d 637 (N.D. Ohio 2010):

> "Structural errors typically arise in the context of criminal trials. A structural error is "a defect in the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Neder v. U.S.*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)(internal citation omitted). Because they "deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, "structural **errors** *per se* require setting aside the entire proceeding. *Id.* at 8-9, 119 S. Ct. 1827.
>
> By contrast, trial-type **errors** are subject to **harmless error analysis**, because they "may be quantitatively assessed in the context of other evidence presented ... to determine" the effect of the **error**. *Arizona v. Fulminante,* 499 U.S. 279, 307–08, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Judicial review of agency action under the APA, moreover, contemplates a **harmless error analysis**. 5 U.S.C. § 706 ("[A] court shall review the whole record ... and due account shall be taken of the rule of prejudicial **error**."); *see also Shinseki v. Sanders,* —— U.S. ——, 129 S.Ct. 1696, 1704, 173 L.Ed.2d 532 (2009) (noting that "the APA's reference to 'prejudicial **error**' is intended to sum up in succinct fashion the ' **harmless error**' rule" (internal quotation and citation omitted)).
>
> An analogy may assist to clarify the distinction between structural **errors** and those amenable to **harmless error analysis**. If the proceedings before OFAC were a house, and termites represented OFAC's **constitutional violations**, the question of whether the violations rise to the "structural" level is whether the termites' damage to the structural integrity of the house is so significant as to require demolishing and completely rebuilding the house, or whether repairs can return the house to a safe and stable condition. In other words, I must determine whether what was done was irreparably destructive, or simply damaging, even seriously damaging.

Id. at 653-54.

The analogy in *Kindhearts* is instructive in the instant case. The Attorney General seeks to have this Court "demolish" the pardons in this case because of an alleged constitutional violation which undisputedly would not have affected the outcome, i.e., the issuance of the pardons. The publication requirement is for the benefit of the Governor as the Chief Executive Officer. The only logical purpose of the publication requirement is for the Governor to have an

opportunity to consider public comment during his personal deliberations regarding whether to grant the pardon. In order to find "structural error" this Court must find that the failure to comply with the publication requirement resulted in actual prejudice.

There is no constitutional or statutory provision requiring the Governor to do anything in response to the publication. There is no constitutional provision <u>for anything</u> to happen as a result of the proposed publication.

To show actual prejudice or "structural error", the Attorney General must show that if the subjects of the pardon had published the notice, the publication would have resulted in a different outcome. The only individual who can attest to whether or not the failure to publish would have resulted in the consequence of a different outcome is the Governor who issued the pardons. In order to make such a finding, this Court must impermissibly delve into the deliberative process of the Governor when granting a pardon. Without delving into the deliberative process of the Governor, this Court cannot find structural error, and it must therefore conclude that any constitutional error resulting from the failure to publish notice was harmless constitutional error

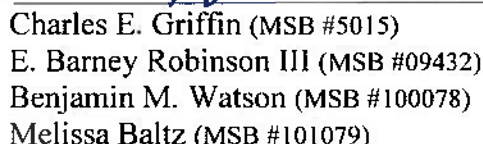
CONCLUSION

For the foregoing reasons, Amicus Curiae Governor Barbour respectfully requests that this Honorable Court dismiss the First Amended Verified Complaint and the entirety of this case.

THIS the 23rd day of January, 2012.

Respectfully submitted,

FORMER GOVERNOR HALEY BARBOUR



By: ______________________________

Charles E. Griffin (MSB #5015)
E. Barney Robinson III (MSB #09432)
Benjamin M. Watson (MSB #100078)
Melissa Baltz (MSB #101079)

HIS ATTORNEYS

OF COUNSEL:

BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC
200 Renaissance at Colony Park, Suite 1400
1020 Highland Colony Parkway (39157)
Post Office Box 6010
Ridgeland, MS 39158-6010
(P) (601) 948-5711
(F) (601) 985-4500
(E) charles.griffin@butlersnow.com

ATTORNEYS FOR *AMICUS CURIAE*
FORMER GOVERNOR HALEY BARBOUR,
IN HIS CAPACITY AS THE GOVERNOR OF MISSISSIPPI AT THE TIME OF THE EVENTS ALLEGED IN THE FIRST AMENDED VERIFIED COMPLAINT

CERTIFICATE OF SERVICE

The undersigned, attorney for Former Governor Haley Barbour does hereby certify that he has delivered a copy of the foregoing instrument to the following, via First Class United States Mail, postage prepaid, e-mail and as otherwise reflected below:

The Honorable Jim Hood
Special Assistant Bridgette Wiggins
Attorney General for the State of Mississippi
P.O. Box 220
Jackson, Mississippi 39201
jhood@ago.state.ms.us
bwill@ago.state.ms.us

Alison Oliver Kelly
Alison Oliver Kelly, PLLC
Attorney at Law
P.O. Box 1644
Jackson, MS 39215
kellymd10@aol.com

U.S. Mail, E-mail and Hand Delivery
Honorable Tomie T. Green
Circuit Court Judge
First Judicial District of Hinds County, Mississippi
Hinds County Courthouse
407 East Pascagoula Street
Jackson, MS 39201
fashley@co.hinds.ms.us

David K. Scott
Mississippi Department of Corrections
723 North President Street
Jackson, MS 39201
dscott@mdoc.state.ms.us

Thomas M. Fortner
Richard A. Filce
ERIK M. LOWREY, P.A.
Attorneys at Law
525 Corinne Street
Hattiesburg, MS 39401
fortnertm@gmail.com
tom@eriklowreypa.com

This the 23rd day of January, 2012.

Charles E. Griffin (MSB #5015)